Supreme Court, U.S.
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NO. 98-894

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LESTER SCOTT,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS SEVENTH JUDICIAL DISTRICT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In January, 1993, the Youngstown Police Department (hereinafter YPD) received complaints about drug dealing in the Westlake Housing Project, specifically at 1225 Otis Street, Apartments 254, 255 and 261, Youngstown, Mahoning County, Ohio. Lester Scott and his fiancé resided in Apartment 254. As part of its investigation, YPD conducted random surveillance which indicated that a constant flow of people entered and exited the apartments after staying only a few moments. This type of traffic is consistent with the drug trade. "P.O.S.S.E.", an intelligence unit comprised of police officers, supplied the YPD officers with information that there were several look-outs who used headsets and other equipment. All of his activity is consistent with the drug trade.

Two investigating officers met with a confidential informant who had previously provided information that successfully led to two other convictions. After searching the informant to make sure that he had no drugs, weapons or other

articles which would compromise a controlled drug buy, the YPD officers sent the informant to one apartment in an attempt to purchase drugs. He was kept under surveillance. After returning to the officers, the informant turned over a bag containing crack cocaine. This first controlled-buy took place in November, 1993; a subsequent controlled-buy took place in March, 1994. On each occasion, the informant purchased drugs from women identified as Crystal Scott and Alberta MacGauley.

As a result of these occurrences and 72 hours after the second controlled-buy, the officers requested a warrant to search the three apartments that had been under surveillance on Otis Street. Based on the information gathered by the police as well as the drug-buys in November, 1993 and March, 1994 that indicated the presence of drugs on the premises, a search warrant was issued to YPD.

YPD officers saw Petitioner and his fiancé driving in the neighborhood and informed them that their apartment was being searched. Petitioner and his fiancé returned to their apartment in

order to be present during the search. Petitioner directed the police officers to the location of cocaine on the premises. The police also discovered criminal tools consisting of headsets and a police scanner. In addition, the police confiscated a large number of weapons, papers in the Petitioner's name, a pager and banking paraphernalia.

Lester Scott was arrested on or about March 20, 1994. He was indicted on charges of possession of criminal tools, pursuant to O.R.C. §2923.24, and drug abuse, pursuant to O.R.C. §2925.11(A)(C)(1). He filed a Motion to Suppress the evidence seized from his premises arguing an insufficient basis existed for the issuance of a search warrant. This Motion was heard on October 4, 1994 and overruled. Lester Scott's subsequent trial ended in a mistrial. The new trial date was set and Petitioner filed another Motion to Suppress on March 14, 1995. A Franks hearing was held April 3, 1995. The trial court, again, overruled Petitioner's Motion to Suppress on the basis that there was probable cause for the issuance of the search warrant and because

the trial court concluded that the police officers obtaining the search warrant had neither lied nor acted with reckless disregard for the truth. The evidence was, therefore, admitted and Petitioner was convicted of the aforementioned charges. Petitioner was sentenced on each of the two counts. The Seventh District Court of Appeals affirmed this conviction on March 9, 1998. The Ohio Supreme Court denied Scott's leave to appeal and dismissed the appeal to that court on July 1, 1998.

REASONS FOR OPPOSING WRIT

I

THE SEARCH AND SEIZURE WARRANT ISSUED DID NOT VIOLATE THE ACCUSED'S DUE PROCESS RIGHTS SINCE PROBABLE CAUSE SUPPORTED THE WARRANT.

The Appellant's disdain of the legal process in criminal proceedings, does not present a valid argument to support his apparent claim that probable cause did not support the issued search warrant. In his first claim, Scott argues that hearsay improperly supported the approval of the search warrant.

Scott's arguments misconstrue the law and fail to provide

a foundation for this Court's review. Probable cause must support the issued warrant. Franks v. Delaware (1978), 438 U.S. 154. "Probable cause is a practical nontechnical conception." Brinegar v. United States (1949), 338 U.S. 160, 176. The judge issuing the search warrant must determine if the facts submitted provide a substantial basis to believe there is probable cause. Illinois v. Gates (1983), 462 U.S. 213, 238. A reviewing court owes "great deference" to the opinion of the judge issuing the warrant. Id. at 236. Clearly, the determination of probable cause is not proof beyond a reasonable doubt. "The task of the issuing magistrate is simply to make a practical common sense decision whether given all the circumstances set forth in the affidavit before him...there is a fair probability that contraband or evidence will be found in a particular place." Id. at 238. Probable cause requires that there is "a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged...." Portis v. Trans Ohio Savings Bank (1988),

46 Ohio App. 3d 69 paragraph 3 of syllabus. While the Appellant clearly disapproves of the use of hearsay to support a search warrant, this Court has held that an affidavit supporting a search warrant may be based upon hearsay information. Aguilar v. Texas (1964), 378 U.S. 723, 729.

Scott challenges the facts in the affidavit by pointing to the affidavits and testimony of Crystal Scott and Alberta MacGauley. Scott argues that these two women denied selling drugs; he points to the affidavit which indicates that drugs were sold by these two women. As a result, he claims that there was no probable cause to support the search warrant.

Scott misconstrues the burden placed upon him by this Court in Franks v. Delaware (1978), 438 U.S. 154. In Franks, this Court ruled that an appellant could challenge the warrant affidavit if he made a substantial preliminary showing that the affiant had intentionally or recklessly included a false statement in the warrant affidavit and the false statement was material and necessary for a finding of probable cause to issue. Id.

> "A Franks' hearing affords defendant the opportunity to show by a preponderance of the evidence that the warrant affidavit contained perjury or a reckless disregard for the truth. If the defendant meets this burden, the court will set aside that false material contained in the warrant affidavit and if probable cause cannot be established from the valid truthful portion of the affidavit, the entire search is deemed to be invalid and the ensuing search is void."

United States v. McDonald, 723 F. 2d 1288, 1292 (7th Cir. 1983).

The only relevant conduct in a hearing to determine the sufficiency of the affidavit supporting a search warrant is the conduct of the affiant. Franks, supra at 171. Appellant's burden at this hearing is to demonstrate that the police officers obtained the warrant on the basis of information they knew to be false or with a reckless disregard for the truth. Id. "To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made the false statement either intentionally or with reckless disregard for the truth." State v. Waddy (1992), 63 Ohio St. 3d 424, 441.

Scott failed to meet this burden. He presented the court with statements from two women declaring that they did not sell drugs to the confidential informant. In contrast, the police officers indicated that the confidential informant did in fact buy drugs from the two women. This is a question of fact to be resolved. Scott presented no evidence to prove that the confidential informant lied to the police officers or that the police officers lied to the court.

It is well established that "the weight of the evidence and credibility of witnesses are primarily for the trier of facts." State v. Dunlap (1995), 73 Ohio St. 3d 308, 314. Deference must be given to the findings of the trial court because the trial judge is in the best position to view the witnesses, observe their demeanor and use these observations to determine their credibility. Totally overlooked by the Appellant is the well established principal that the trier of fact is entitled to believe or disbelieve any witness. State v. Antill (1964), 176 Ohio St. 61.

Despite the Appellant's objections, a trial court has the

discretion to believe or disbelieve any testimony. In this case, the trial court obviously chose not to believe the affidavits and testimony of Ms. Scott and Ms. MacGauley. As noted by the appellate court, the trial court could easily find their testimony to be fabricated and self serving. As a result, the Appellant did not meet the burden of proof required namely to show that the affiant made a false statement or that these statements were made with reckless or intentional disregard for the truth. As a result, the appellate court below properly affirmed the decision of the trial court.

II
THE RECORD FAILS TO SUPPORT THE CLAIM THAT THE INFORMANT ASSUMED THE STATUS OF AN AGENT OF THE POLICE.

Scott argues without factual basis that the informant became an agent of the state whose remarks can consequently be attributed directly to the state. The test to determine whether an informant is a police agent has two prongs: (1) whether the government knew of or acquiesced in the intrusive conduct and

(2) whether the informant's purpose was to assist law enforcement or to further his own ends. United States v. Feffer, 831 F. 2d 734, 739 (7th Cir. 1987). The law clearly states that the burden is upon the appellant to establish that the confidential informant was acting as a government agent. United States v. Koenig, 856 F. 2d 843, 847 (7th Cir. 1988).

Neither case law nor common sense supports the proposition that:

> "a confidential informant automatically obtains and retains an ongoing status as a law enforcement officer or a government agent for Franks' purposes by virtue of past assistance to the police. It is every citizen's civic duty to do what he can to aid in the control and prevention of criminal activity."

Id. at 850.

Scott merely poses the conclusion without factual basis that the confidential informant became a government agent. It is well settled that his attack must be more than conclusory. United States v. Radtke, 799 F. 2d 298, 310 (7th Cir. 1986).

The Appellant failed to demonstrate either that the

confidential informant made false statements or that the police officers acquiesced in these allegedly false statements. This informant had provided truthful information in the past. The information provided to the police officers by the informant was believable. Scott merely speculates as to the motivations for the informant's participation in the controlled drug buys. The Appellant did not offer conclusive proof at the suppression hearing to support the claim that the informant became a government agent. Finally, even had this proof been offered, noticeably absent from the Appellant's proof is any demonstration that the information provided by the confidential informant consisted of any lies or falsities.

The trial court made a credibility determination of the witnesses which included the police officers as required in a Franks hearing. The focus of this hearing was to determine whether the officers lied or proceeded with reckless disregard of the truth when submitting the affidavit for the search warrant. The Appellant failed in meeting the burden to establish either that

the officers lied or that they proceeded with reckless disregard for the truth. It follows then that the trial court's ruling was not arbitrary, capricious or unreasonable. The trial court did not abuse its discretion. As a result, Scott's claimed error lacks merit.

III
THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT ASSESSED THE CREDIBILITY OF WITNESSES.

The Appellant, obviously dissatisfied with the trial court's finding, asserts that the trial court denied him due process when the court evaluated the testimony of the witnesses at the Franks hearing. Totally ignored by Scott is the fact that the role of the trial court is to assess the weight of the evidence and the credibility of the witnesses. State v. Dunlap (1995), 73 Ohio St. 3d 308, 314. While he repeatedly argues that defense witnesses should have been believed, it is settled, well established law that "the weight to be given to evidence and the credibility of witnesses are primarily for the trier of facts." State v. DeHass

(1967), 10 Ohio St. 2d 230 paragraph 1 of syllabus. It is also well settled law that deference must be given to the findings determined by the trial court. The court is in the best position to not only see the witnesses but also to observe and assess their demeanor. These observations are utilized in assessing the credibility of the testimony. Without question, the trier of fact has the right to believe or not believe any testimony offered. State v. Antill (1964), 176 Ohio St. 61.

Within these perameters the trial court issued its decision placing credence in the testimony of the police officers over that of the defense witnesses. The fact that this occurred does not establish a denial of due process. The burden of proof was placed upon the Appellant at the hearing challenging the search warrant. Franks v. Delaware (1978), 438 U.S. 154. The trial court is not required to believe testimony of defense witnesses. Since the trial court found the defense witness statements not to be credible, the Appellant did not meet his burden of proof. As a result, Scott's position lacks merit.

CONCLUSION

The Appellant's challenge alleging violations of due process rights lacks merit. The basis of his challenge lies in the trial court's decision to give credence to the affidavits and testimony of police officers over the conflicting testimony of defense witnesses. Settled well established law places the discretion with the trial court to believe or disbelieve any witness testimony. The issues and law involved in this case are settled and well established. Consequently, they do not warrant this Court's review.

Certiorari must be denied.

Respectfully submitted,

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